



Making San Francisco Bay Better

December 12, 2013

Peter Prows  
Briscoe Ivester & Bazel LLP  
155 Sansome Street, Seventh Floor  
San Francisco, California 94104

**AND**

Richard Sinkoff, Director of Environmental Programs and Planning  
Port of Oakland  
530 Water Street  
Oakland, California 94604-2064

**SUBJECT:** Failure to Permanently Guarantee the Public Access Area Required by  
Special Condition II-B-3 and -4 at Scott's Jack London Seafood Restaurant  
(BCDC Permit No. 1985.019B and Enforcement File No. ER2013.008)

Dear Mr. Prows and Mr. Sinkoff:

I. **Background.** The letter dated May 16, 2013, informed you that you had not submitted and obtained staff approval of a legal instrument required to permanently dedicate the pavilion public access area, as required by Special Condition II-B-3 of the Scott's permit. Four months later, on September 11, 2013, Simran Mahal, Legal Intern, notified you that the draft legal instrument was effectively approved, but for replacing the signature blocks, correct copies of which she remitted to you. Ms. Mahal directed you to execute the legal instrument and submit it to us for execution so that we could return it to you for recordation.

Two weeks later, on October 30, 2013, I called Mr. Prows to inquire about the status of the legal instrument, who informed me that the delay was with the Port. That same day, I emailed Mr. Sinkoff and Julie Braun requesting that the Port execute the legal instrument. By email dated October 31 2013, Diane Heinze informed me that the Port had executed the legal instrument and would hand deliver it to Mr. Prows the following day. In spite of these prompts and exchanges, between October 31 and December 5, 2013, we did not receive the executed, not to mention recorded, legal instrument.

However, on December 5, 2013, we received an email from Mr. Prows stating the reason we had not yet received the executed instrument is because ... "the Port's surveyors have identified some discrepancies with the legal description." Mr. Prows requested a meeting to discuss these discrepancies. On December 6, 2013, I provided possible meeting dates and requested a more detailed explanation of the concerns. On December 9, 2013, Mr. Prows submitted a copy of the relevant page of Exhibit C of the Port's Conditions, Covenants, and Restrictions (CC&R) document showing the area it dedicated to comply with the Port's permit's public access requirements and the area to be dedicated pursuant to the Scott's permit's requirements. Mr. Prows' email states "That exhibit shows that Scott's leased parcel does not match improvements." Also on December 9, 2013, Dave Murtha, Port Surveyor, submitted a list of problems and a color-coded copy of the same, albeit enlarged, exhibit provided by Mr. Prows.

**II. Options for Fulfilling the Scott's Permit Public Access Dedication Requirement In Light of the Problems with the Lease.** We have reviewed Mr. Murtha's list of comments and the associated exhibit and have the following responses:

- A. Lease and Pavilion Area Offset: Together, the already recorded CC&R required by BCDC Permit No. 1985.019A and the draft CC&R required by BCDC Permit No. 1985.019B will jointly result in the dedication of a contiguous area of public access. That the lease area does not match the pavilion area does not impact the Port and Scott's ability to now dedicate the pavilion area for public access since both entities are co-permittees and will execute the CC&R document. You may either (1) revise your lease agreement and leave the document as is, or (2) revise the CC&R language and Exhibit A thereto to reflect that a portion of the pavilion is leased to Scott's and a portion is in possession of the Port.

If you choose the prior approach, you will be in violation of Special Condition II-B-4 of the B permit and subject to new standardized fines outlined below. If you choose the latter approach, you will remain in violation of Special Condition II-B-3 of the B permit, having in effect withdrawn the approved document due to your own errors, rendering a continued running of the standardized fine clock since September 11, 2013, as also outlined below;

- B. Scott's Lease Area Located Outside the Pavilion and Within the Port's Permit Area: You must either revise the lease to remove the area colored orange on Mr. Murtha's rendering or Scott's must dedicate that area as public access. While the area is already dedicated by the Port, once the Port granted its interest to another party, that party must separately dedicate this area under its separate ownership interest. Scott's may either revise the pending legal instrument to include this area, in which case it would satisfy the requirements of two permits, or Scott's may prepare a separate legal instrument for the orange colored area. This is a new violation, potentially subject to standardized fines to be determined based on your selected course of action;
- C. Stage Area: This matter does not affect the presently required CC&R document. We are aware that the stage falls within a dedicated public access area and have, for this reason, advised you to seek a material permit amendment to the Port's permit to retain it. If the Commission were to approve the stage, the amended permit would address the modifications to the existing required public access area; and
- D. Two Triangular Areas: During our review of the draft CC&R document for the B permit, we considered that (1) the retractable wall panels form a true square whereas the tent panels did not, and (2) the two triangular areas are already dedicated as public access in the Port's permit's CC&R document, though not required, and were going to be again dedicated as public access in the Scott's permit's CC&R document, as required by the Scott's permit. We concluded that we would be concerned about a gap, but we find a duplication of a small area harmless and, furthermore, see no merit in requiring the Port to revise its legal instrument to eliminate it, though you are welcome to voluntarily make this revision.



**III. Continuation of Standardized Fine Clock for Violation of Special Condition II-B-3 of the Scott's Permit OR Commencement of Standardized Fine Clock for Violation of Special Condition II-B-4 of the Scott's Permit.**

If the instrument as approved is inaccurate and therefore subject to change, the standardized fines will not have stopped accruing on September 11, 2013, and will instead have continued to accrue without interruption since then and until a revised copy is subsequently approved that meets the Port's, Scott's and BCDC's satisfaction.

On the other hand, if the instrument is not subject to change, Special Condition II-B-4 of BCDC Permit No. 1985.019B states that you must provide the staff with evidence of having recorded the legal instrument within 60 days of approval, which was September 11, 2013. Therefore, as of November 10, 2013, which is 60 days after September 11, 2013, you had failed to comply with this permit requirement and this letter commences a new penalty clock. If you provide the staff with evidence of having recorded the legal instrument between 36 and 65 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$1,000. If you provide the staff with evidence of having recorded the legal instrument between 66 and 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000. If you provide the staff with evidence of having recorded the legal instrument more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000 plus \$100 per day, from the 96th day to the date you provide staff evidence of having recorded the legal instrument (14 CCR § 11386(e)(2)).

**IV. Status of Violations Cited in the Letter Dated May 16, 2013.** All other violations cited in the letter dated May 16, 2013, remain unresolved with the exception of (1) the planters, which have been removed, and (2) the event reporting, which has been provided. You have also obtained written plan approval for the proposed public access signage, tables, and chairs, which has been granted. If the required public access signage, tables and chairs are installed pursuant to this plan approval when the pavilion is not in use, you should notify us immediately either by submitting photographic evidence of compliance or to request a site visit.

We look forward to hearing from you about how you plan to resolve the lease problem that you have brought to our attention. If you have any questions about this letter and still wish to meet, please contact me at 415-352-3609 or by email at [adriennek@bcdca.gov](mailto:adriennek@bcdca.gov).

Sincerely,



ADRIENNE KLEIN  
Chief of Enforcement

AK/ms

cc: Douglas Herman, Associate Port Environmental Scientist  
Steve Hanson, Consultant to Scott's Restaurant  
Caroline Morris, Ellis Partners LLC  
Dave Murtha, Port Surveyor